United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig. w/affidavit of 8 mailing 1462

76-1402

To be argued by
JONATHAN M. MARKS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1402

B p/s

UNITED STATES OF AMERICA,
Appellee,

—against—

LAMONT FLOYD and PETER OLIVO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
JONATHAN M. MARKS,
Assistant United States Attorneys,
(Of Counsel).

UNITED STATES COURT OF APPEALS
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Preliminary Statement

Appellants Lamont Floyd and Peter Olivo appeal from judgments of conviction entered October 1, 1976, in the United States District Court for the Eastern District of New York (Pratt, *J.*), after a five day jury trial, convicting them of armed robbery of the Chase Manhattan Bank at 1104 Rutland Road, Brooklyn, New York, on October 31, 1975, in violation of T. 18, U.S.C., §§ 2113 (a) and (d) and 2. Floyd was sentenced to 15 years imprisonment as an adult and Olivo to 10 years under T. 18, U.S.C. § 5010(d) as a youth offender. Both appellants are presently incarcerated.[1]

[1] An accomplice of appellants, Edwin Almestica, pleaded guilty to robbing the same bank on March 3, 1976, in violation of T. 18, U.S.C., § 2113(a). That plea was also in satisfaction of all potential charges against him arising out of the October 31st bank robbery. Almestica was sentenced to 18 years imprisonment. *See, United States* v. *Almestica*, Docket No. 76-1325, — F.2d —, Slip. op. (2d Cir., decided December 16, 1976).

[Footnote continued on following page]

On appeal, appellants raise four points. Appellant Floyd challenges the admission of certain testimony, as against him, on the ground that it was hearsay. Appellants together object to statements in the prosecutor's summation concerning missing witnesses. They also claim error in the judge's charge on accomplice and defendant testimony, and they contend that the testimony of one Government witness should have been excluded because of the alleged failure of the Government to disclose his identity prior to trial.

Statement of Facts

A. The Government's Case in Chief

The evidence showed that on October 31, 1975, at about 10:25 A.M., appellants Floyd and Olivo, together with Edwin Almestica, robbed a branch of the Chase Manhattan Bank at 1104 Rutland Road in Brooklyn, New York, making off with approximately $8,591.00 (85) in bank funds.[2] Each of the robbers wore a mask and was armed; Floyd carried a sawed-off shotgun; Olivo had a .22 calibre revolver, and Almestica carried a .25 calibre automatic (144, 155, 165-168; Gov. Exhibit 1). During the robbery, when there were about 50 customers in the bank (26), Olivo's revolver was loaded and cocked (Gov. Exhibit 1) and, while in the bank, Floyd twice fired his shotgun.

Appellants' other co-defendant, Xavier King, who testified for the Government at trial, was convicted, upon his plea of guilty, of receiving $1000.00 of the proceeds of the October 31st robbery, in violation of T. 18, U.S.C., § 2113(c). King's initial sentence under T. 18, U.S.C., § 5010(b) was later modified to six months imprisonment and four years probation.

[2] References are to pages of the trial transcript.

Xavier King was the Government's principal witness. He testified pursuant to an agreement with the United States Attorney's Office, whereby he pleaded guilty to the 10 year charge of receiving stolen bank funds, T. 18, U.S.C. § 2113(c), and the Government agreed to apprise the sentencing judge of his cooperation (110-111).

King began by telling how sometime after midnight on October 31, 1975, he was summoned to an apartment at 843 Saratoga Avenue in the Brownsville section of Brooklyn (113-113a). When he arrived, King found appellants Floyd and Olivo and Almestica in the apartment (114). Floyd asked King to find a car for a bank robbery and to drive Floyd and the others to the bank; King agreed (118). Thereafter, King found a blue Ford LTD with the ignition already popped and drove it back to the apartment, parking it in front of the building (119, 124-125). At about 4 A.M., King went up to the apartment and slept awhile. He then left and returned at approximately 8:30 or 8:45 A.M., to find that Floyd, Olivo and Almestica had been joined by Olivo's girlfriend, Beverly Boston (130).

After he had returned, King went into the bedroom in the apartment and examined a sawed-off shotgun, a .25 calibre automatic and a .22 calibre revolver lying on the bed. All three weapons were loaded (131, 137). Floyd then gave each of the participants his orders for the planned robbery. King was to drive; Olivo was to take the revolver, and Almestica was to carry the automatic (144). Almestica said that he would go over the counter and asked Olivo to cover him (146). The four men then left the apartment at about 9:15 A.M. and drove to Woolworth's on Pitkin Avenue in Brooklyn to buy some masks (147-148).[3] After leaving Woolworth's with

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[3] The robbers chose to conceal their identities by disguising themselves as characters from the television cartoon series the "Flintstones" (148-149).

their masks, the four drove to the Rutland Road branch of the Chase Manhattan Bank. King circled the block several times, then parked the LTD around the corner from the bank and waited, while Floyd, Olivo and Almestica went inside, Floyd carrying the sawed-off shotgun concealed in his pants leg (155).

It was about 10:25 A.M. when the three masked men entered the bank.[4] Floyd, carrying the shotgun, stationed himself near the entrance and fired his weapon (20, 22-23). Meanwhile, Almestica vaulted the counter (24-25), while Olivo, wearing a denim jacket with cut-off sleeves, covered him by pointing his cocked handgun towards the tellers and the customers (25-26, Gov. Exhibit 1).[5] While the robbery was taking place, Floyd forced Louis at gunpoint to take a customer's wallet and give it to him (26-29). After they had gathered up the money, Floyd Olivo and Almestica fled the bank, but not before Floyd had once more fired his shotgun (39).

The robbers then jumped into the waiting LTD and were driven by King to 843 Saratoga Avenue. King parked the car on Strauss Street, just behind the building (157, Gov. Exhibit 4). Then, he, Floyd, Olivo and Almestica went inside where they counted and divided the proceeds of the robbery (158-159). Also present was Suqulia "Van" Manning, Floyd's girlfriend (151).

---

[4] James Louis, a bank guard, testified concerning the robbery. Although he was unable to identify the robbers on account of the fact that they wore masks, Louis did describe the robbers as being approximately the same height and weight as appellants and Almestica (19, 23-25, 36-38).

[5] King was able to identify the clothing and weapons of each of the three bank robbers shown in the bank surveillance photographs (165-168).

The Government also called James Duffin as a witness. Duffin testified that on November 1, 1975, the morning after the bank robbery, Olivo asked him to take a walk with him. They went to a gas station where Olivo bought sixty-five cents worth of gasoline. Olivo then told Duffin that he and Floyd had used a car in a bank robbery and Olivo was going to set it afire. Duffin agreed to help him, and the two of them then went to the vicinity of Strauss and Riverdale Streets, directly behind 843 Saratoga Avenue, where Olivo doused the LTD with the gasoline and set the car on fire (293, 298-300). An FBI agent, Theodore Viates, testified that on November 3, 1975, he found the burned out bulk of the Ford LTD directly behind 843 Saratoga Avenue (339-342).

Finally, bank surveillance photographs (88) which were received in evidence contain clear pictures of Floyd and Olivo, although their faces are covered by masks (Gov. Exhibit 1). One picture, however, shows an unobstructed view of the side of Floyd's face (Gov. Exhibit 1-B). The Government had Floyd stand with that side of his face to the jury so that the jury could compare the photograph with Floyd himself (343-349).

B. The Defendants' Case

Both appellants testified and each put on an alibi witness.

1. Appellant Floyd's defense

Floyd testified on direct examination that he spent the morning of the bank robbery with his girlfriend, Suqulia "Van" Manning, and passed the afternoon watching television, including a program featuring a character named "Herman Munster" (492-499). On cross-examination, Floyd reaffirmed that he had watched "The Munsters" on television on October 31st, and testified further that nothing exceptional happened on that day (518-519, 554). He also first denied that he had discussed the case with his girlfriend, Manning, but then admitted that he had (515-516). Floyd further admitted that he was unemployed at the time of the robbery (511).

Appellant Floyd called Suqulia "Van" Manning as an alibi witness. She testified on direct that she spent the morning and the early afternoon of October 31st with Floyd and that she remembered that she had done so by referring to a calendar on which she wrote reminders of future appointments and dates with Floyd (401-410, Gov. Exhibit 8).

On cross-examinaion, Miss Manning testified that she wrote the notation "Si Lamont" on her calendar for October 31st *after* she had seen Floyd (454). She recalled the precise dates on which she wrote eight similar notations in October 1975, each notation being written on a different date from the date on which the entry appeared (458-460). She also recalled unquestionably that she was with Floyd on October 15th or October 16th, 1975; however, when confronted with the fact that there was no entry for either of those dates, she tesified, "Then it was

the 18th." (476-477). Miss Manning first denied, but then admitted, talking to Floyd after she decided to testify (470, 473).

2. Appellant Olivo's defense

Olivo testified on direct examination that he spent October 31st with his girlfriend, Beverly Boston, and that he remembered the day because he had met Boston for the first time the previous day and that he had decided to call Halloween, October 31st, their anniversary (658, 668). He also denied burning the LTD and making any staements to Duffin (666).

On cross, Olivo reaffirmed his testimony that he never met Beverly Boston before October 30, 1975, but later admitted that he had spent August 31, 1975, celebrating Miss Boston's birthday (690, 713-714). He also denied ever using another name, but then admitted using the name "Peter R. Childs" (668). In addition, he testified that he introduced King to Beverly Boston in late November 1975 (995).

Beverly Boston took the stand as an alibi witness for appellant Olivo. On direct, she testified that on October 31st, she met Olivo at about ten o'clock in the morning (twenty-five minutes before the bank robbery) and stayed with him until about six in the evening (596).

On cross, Miss Boston testified that she went to school that morning, arriving at eight o'clock. She stated that she attended two classes, plus a homeroom, and then took two buses to get to the place where she said she met Olivo, arriving there, by her own admission, at about 10:40 (621-629, 637).

C. The Government's Rebuttal Case

The Government's rebuttal case consisted in part of a stipulation to the effect that "The Munsters" (the television program appellant Floyd testified he was watching on the day of the robbery and the day before) was not shown on either October 30 or 31, 1975 (730-731).

In addition, the Government recalled Xavier King, who testified that in late November 1975 (when Olivo and Boston, Olivo's alibi witness, testified Miss Boston met King for the first time) King was in California (733). Two documents establishing that King took a driving test in Los Angeles on November 12, 1975, were received in evidence (740-741).

ARGUMENT

POINT I

The court did not err in admitting an admission of appellant Olivo implicating Floyd.

As stated above (Statement of Facts, *supra* at 5), James Duffin testified that on the morning of November 1, 1975, the day after the bank robbery, Olivo asked him to take a walk. As they were walking, Olivo told Duffin, in Duffin's words, that "Lamont, him and some other people I don't know . . ." had robbed a bank (293). When Olivo and Duffin arrived at a gas station, Olivo said that he wanted to burn the car which had been used in the bank robbery. Olivo and Duffin then went to the street behind 843 Saratoga Avenue and after dousing the abandoned LTD with gasoline, set it afire (299-300). Appellant Floyd moved to strike that portion of Duffin's testimony which contained the statement of Olivo im-

plicating Floyd in the bank robbery (293). The court asked counsel for Olivo if his client was going to take the stand as counsel had stated in his opening. When Olivo's attorney said that it was his intention to have Olivo testify, the court denied Floyd's motion to strike (297-298).

On appeal, appellant Floyd argues that his conviction should be reversed because of the admission, over his objection, of Duffin's testimony concerning Olivo's statement. Floyd bases his argument on the contention that Olivo's statement was not made "during the course and in furtherance of the conspiracy," Federal Rules of Evidence 801(d)(2)(E), and was thus inadmissible hearsay.

We disagree. The conspiracy in this case began sometime after midnight on October 31, 1975, with Lamont Floyd asking King if he would find a car to be used in a bank robbery. The bank was robbed at about 10:25 that morning. The robbers parked the getaway car just behind the apartment where Floyd, Olivo and Almestica had planned the robbery and where they returned to divide the loot. The following morning, November 1st, Olivo asked Duffin to help him douse the getaway car with gasoline and set fire to it(239-340). The conspiracy to obtain a getaway car and rob the bank did not end here until the getaway car had been destroyed. That was done the day after the robbery itself. The car was burned in the course of and in furtherance of the conspiracy. Olivo's statement to Duffin that the car was used in a bank robbery which he and Floyd had committed was clearly made in furtherance of the scheme to burn the car and was, accordingly, in furtherance of the conspiracy itself. Thus, the statement was not hearsay, Federal Rules of Evidence 801(d)(2)(E).

The statement is analogous to the admission held to be admissible by this Court in *United States* v. *Frank*, 494 F.2d 145 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). There, defendants Frank, Hemlock, Hoffer and

Miller entered into a conspiracy to swindle a Mrs. Dominguez out of about $700,000.00, by investing her money in two parcels of relatively worthless land. After the money had been purloined, Mrs. Dominguez became suspicious of the fact that there was fraud afoot and asked for the return of her $700,000.00. On September 24, 1968, after the money had been taken, defendants Frank and Miller made certain imaginative excuses to Mrs. Dominguez to explain why they had paid a huge sum of her money for worthless land, excuses which the Government offered against all the defendants at trial. In holding that the statements of Frank and Miller had been properly admitted against Hemlock and Hoffer, this Court (*per* Friendly, *J.*) stated, at 494 F.2d 155-156:

> We have little difficulty in holding that despite Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 L.Ed. 790 (1949), Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953), and Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2d 931 (1957), the conspiracy to defraud Mrs. Dominguez was continuing as late as September 24. The basis of *Krulewitch* was "that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her," 336 U.S. at 442, 69 S.Ct. at 718; the Court rejected the argument "that even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment [from the government] as its sole objective." 336 U.S. at 443, 69 S.Ct. at 718. *Lutwak* and *Grunewald*

added nothing more, although Mr. Justice Harlan's opinion in the latter is useful for its explication, 353 U.S. at 402, 77 S.Ct. at 972:

> Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.
>
> Here the conspiracy could well be regarded as not simply to perpetrate the two frauds here described. The evidence suggests that the conspirators thought they had a good thing in Mrs. Dominguez and would defraud her further if the opportunity arose. *More important, the conspiracy even as to the two parcels was not complete so long as Mrs. Dominguez was threatening to get the money back.* (emphasis added).

Similarly, the conspiracy here was "not complete" until Floyd, Olivo, Almestica and King had destroyed the getaway car which was parked only a short distance from the apartment on Saratoga Avenue. Moreover, the statement was made barely 24 hours after the robbery, while Olivo was enlisting the aid of Duffin in the burning of the LTD, an act which was part and parcel of the scheme to rob the bank. The facts here are clearly distinguishable from those in *Krulewitch* v. *United States*, 336 U.S. 440 (1949), relied upon by appellant Floyd, where the statement which the Supreme Court found to have been improperly admitted under the co-conspirator exception to the hearsay rule was made six weeks after the termination of the conspiracy. In short, it can hardly be argued that the Government was guilty here of the vice of extending "indefinitely the time within which hearsay declarations will bind co-conspirators." *Grunewald* v. *United States*, 353 U.S. 391, 402 (1957).

In any event, even assuming *arguendo* that the conspiracy had ended sometime before the morning of November 1st, Floyd was in no way prejudiced by the admission of Duffin's testimony concerning Olivo's statement. As Judge Pratt observed (779), because of the fact that Olivo took the stand and testified, Floyd was not denied the right to cross-examine Olivo concerning the statement.

In *Nelson* v. *O'Neil*, 402 U.S. 622 (1971), O'Neil and his co-defendant Runnels were arrested and charged with kidnapping, robbery and vehicle theft. Part of the evidence offered against them was the testimony of a police officer, who stated that after his arrest, Runnels made an unsworn oral statement admitting the crimes charged and implicating O'Neil. At trial, both Runnels and O'Neil took the stand and gave identical exculpating testimony. In addition, Runnels denied making the unsworn oral state to the police officer which implicated O'Neil. The jury found both defendants guilty. After O'Neil and Runnels were convicted, the Supreme Court decided *Bruton* v. *United States*, 391 U.S. 123 (1968). On the basis of *Bruton*, the United States District Court for the Northern District of California ruled, in a habeas corpus proceeding, that O'Neil's conviction had to be vacated, because of the admission of Runnels' post-arrest admission implicating O'Neil, even though the trial judge had instructed the jury to only consider the statement as against Runnels. The Ninth Circuit affirmed, 422 F. 2d 319 (1970), but the Supreme reversed. In so doing, the Court concluded that

> where a co-defendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds

> to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendment. 402 U.S. 629-630.

Accordingly, we fail to see how appellant Floyd can claim prejudice in the admission of Duffin's testimony concerning Olivo's statement. Olivo took the stand; he denied making the allegedly prejudicial statement (666), and he testified favorably to Floyd by denying that he had robbed the bank. In addition, Olivo was available for cross-examination by Floyd's attorney. Furthermore, Duffin's testimony, in the context of the whole trial, constituted a relatively insignificant portion of the Government's case. As Judge Pratt remarked:

> In the overall context of the issues presented by this case, what was said to Duffin or what was said by Duffin on the witness stand takes on a relatively small part of the picture as compared to what was said by Mr. King. (779).[6]

POINT II

The prosecutor's summation was proper.

During his summation, Olivo's counsel made the following remarks:

> Another thing, on burning the car. Why would Peter Olivo pay $250 to somebody? Act as a lookout? Why couldn't Peter Olivo act as a lookout? All he has to do is take the gasoline, throw it inside the car and burn it. Apparently he wasn't

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[6] We also note parenthetically that Olivo's statement to Duffin bore indicia of reliability as being a statement against penal interest. See *United States* v. *D'Amato*, 493 F.2d 359, 365 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

too concerned about it. They do it in broad daylight, noontime, and there's a guy standing on the stoop. They don't want for him to go away.

Also, where is that Duffin? Why didn't the FBI bring him in? He could have pointed to Peter Olivo, said, "That's the guy that burned the car."

If he was on the stoop he probably lived in that apartment. (858).

* * *

Other things: Where are all these other witnesses? There are other people at 843 Saratoga Avenue. There were girls there. Why weren't any of these witnesses called to say that Peter Olivo was in that apartment?

He absolutely, categorically denied he was ever in that apartment. Why not call any of those witnesses? The Government says, "We have witnesses."

Mr. Lee told us, "We have witnesses who identified the getaway car."

Remember when they were in the getaway car the masks were off. Right?

I'm asking you to infer that. I mean run out of the bank, have a mask on, you're not going to be riding around in the street with the mask on in the car. You would take them off. If people saw the car, why weren't those people called? Maybe they could have identified who was in the car. (860-861).

In his rebuttal summation, the Assistant U.S. Attorney responded to counsel's argument in the following manner:

I would like to address myself to one argument that Mr. O'Biren made in one form and Mr. War-

burgh made in a slightly different form. And that is, where are the missing witnesses.

Now, ladies and gentlemen, the Government has subpoena powers. The defense has subpoena powers. The defense exercised its subpoena powers by calling certain witnesses. Those witnesses are equally available to the defense and to the Government. If the defense felt that there were witnesses out there—that man on the stop whom Mr. O'Brien just mentioned to you—that people who might have been in the apartment at 843 Saratoga Avenue when Peter Olivo and Lamont Floyd planned the bank robbery could have helped them, don't you think they would have called them? Of course they would.

But did they? No.

So when Mr. O'Brien asks you to find a reasonable doubt based on the Government's failure to call additional witnesses, ask yourselves: Why didn't Mr. O'Brien call them? Why didn't Mr. Warburgh call them?

If these witnesses had testimony favorable to the defense, don't you think they would have called them? (864).

At the conclusion of the prosecutor's rebuttal, counsel for both appellants moved for a mistrial, claiming that the Assistant United States Attorney's remarks were improper, on the ground that the defendants were under no obligation to present a defense (869). Judge Pratt denied the motion (872) and pointed out that the Government was properly responding to counsel's "comment upon the absence of certain witnesses." (870). The court went on to note that the record showed that the witnesses were equally available to both sides. (871). And, in its charge, the court instructed the jury as follows:

> Reasonable doubt may arise from the failure of the Government to produce evidence.
>
> A defendant is not obligated to present evidence in his favor. He had the right to rely on the failure by the Government to prove its case. He may also rely on evidence brought out on cross-examination of witnesses called by the Government. On the other hand, a defendant has the power to subpoena anyone in support of his position if he so chooses, and he may exercise that power, if he chooses. (878).
>
> * * * * *
>
> The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence. (892).

On appeal, appellants argue that it was error for the trial court not to declare a mistrial following the prosecutor's statements. We respectfully submit that the contention is wholly without merit.

In view of the fact that both appellants took the stand and produced alibi witnesses, it can hardly be argued that the prosecutor's statements deprived appellants of the "right" to rely upon the prosecution's failure of proof (Appellant Olivo's Brief, page 10). That "right" was waived. Moreover, the rebuttal remarks of the Assistant United States Attorney were a fair and proper response to defense counsel's missing witness charge and were legitimate comment upon the case which the defense elected to present to the jury. See *United States* v. *Crisona*, 416 F.2d 107, 118 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970).

As this Court recently stated in *United States* v. *Rodriguez*, — F.2d — Slip op. 6037, 6042-6043 (2d Cir., decided November 30, 1976):

> We have repeatedly held that the prosecutor may comment upon the defense's failure to contradict the government's case. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1268-1270 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970). This is particularly proper where contradictory testimony was potentially available from witnesses other than the defendant himself. *United States* v. *Lipton*, 467 F.2d 1161 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *Deutsch*, 451 F.2d 98, 117 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

In *Rodriguez*, the defendant did not take the stand. Where, as here, the defendants do testify, the argument advanced by appellants is frivolous.

Moreover, appellants cannot avail themselves of the claim that the potential witnesses were unavailable to them. As Judge Pratt noted (870-871), the record shows that the individuals involved (the man who saw Olivo and Duffin burning the getaway car and people who were in the apartment at 843 Saratoga Avenue when the bank robbery was planned) were no less available to the defense than to the prosecution. The court correctly observed that these people "were friends of the defendants and of the defendants' alibi witnesses." (871). In addition, there was no request for aid in locating these witnesses, and there is nothing in the record to show that they were unavailable to the defense.[7]

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[7] When requesting a mistrial, counsel for appellant Olivo advanced the following argument in support of his contention that the witnesses from the Saratoga Avenue apartment were unavailable to the defense:

> If a witness testifies that Peter Olivo was at a certain apartment and also present was A, B, and C, and if Peter Olivo denies he was at the apartment, he certainly wouldn't have known whether A, B, or C was there. (81).

[Footnote continued on following page]

PONT III

The court's charge was proper.

Appellants claim that the district court erred in its instructions to the jury on accomplice and defendants' testimony. The court's charge on a defendant's testimony was as follows:

> The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence.
>
> A defendant cannot be compelled to take the stand and testify. Whether or not he testifies is a matter of his own choosing. If he does choose to testify, and the defendant Floyd and the defendant Olivo each did in this case, he is a competent witness. In that event he is subject to cross-examination, as you have observed, and his credibility is for you, as the jury, to determine, in the same manner as other witnesses.
>
> You may consider that a defendant has a strong motive to lie to protect himself, but you may also consider that he takes a real risk in subjecting himself to cross-examination and you must decide whether to believe him or how much to believe. (Appellants' Appendix, page 31).

With respect to accomplice testimony, the court gave the following instructions:

> Xavier King testified that he participated in the crime charged. You have the right to suspect

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It goes without saying that under the rationale of such an argument, the only predicate for a defendant's claim, in a case such as this, that witnesses were unavailable to him would be the defendant's own testimony placing himself in a different location from those witnesses and thereby claiming ignorance of them.

> the testimony of a participant in the crime charged if you find that he has a personal stake in the outcome of the trial, or if you find that he believes that the rewards promised depend on the outcome of the trial. Mr. King is not incompetent to testify because of his participation in the crime charged. On the contrary, the testimony of a participant alone, if believed by you to be true beyond a reasonable doubt, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by any other evidence in the case.
>
> You should keep in mind that the testimony of a participant is always to be received with caution and weighed with great care, and you should never convict a defendant upon the unsupported testimony of a participant unless you believe such unsupported testimony to be true beyond a reasonable doubt. (Appellants' Appendix, pages 31-32).

The portion of the court's charge relating to the defendants' testimony was entirely proper. Indeed, it was more favorable to the defense than the charge recently approved by this court in *United States* v. *Martin*, 525 F.2d 703, 706 n.3 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975); *see also*, *United States* v. *Sullivan*, 329 F.2d 755, 756-57 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964).

The attack on the portion of the charge dealing with accomplice testimony is equally without merit. The court's instructions were proper, for it is settled that the trial judge need not charge the jury as to an accomplice's "confessed criminality," as requested by appellant Floyd. *United States* v. *Magnano*, — F.2d —, slip. op. 5471, 5478,

n.3 (2d Cir. decided September 7, 1976); *United States* v. *Dioguardi*, 492 F.2d 70, 82 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974); *United States* v. *Falange*, 426 F.2d 930, 933 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970); *United States* v. *Projansky*, 465 F.2d 123, 136, n.25 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

POINT IV

The court did not err in refusing to exclude Duffin's testimony.

Finally, appellants argue that James Duffin's testimony should have been excluded because he was a witness "upon whom the Government intends to rely to establish the defendant's presence at the scene of the alleged offense," within the meaning of Rule 12.1(b) of the Federal Rules of Criminal Procedure. It is also alleged that the Government failed to disclose Duffin's name prior to trial, as allegedly required by Rule 12.1(d). The claim is totally frivolous.

While it is true that the provisions of Rule 12 do require, under certain circumstances, that the prosecution furnish to the defense the names of those witnesses it intends to call to refute an alibi defense, the fact is that Rule 12 was not applicable here. James Duffin did not establish appellant's presence at the scene of the robbery. His testimony was limited to an incident which occurred on the day after the robbery. Moreover, the Government disclosed Duffin's identity and his anticipated testimony along with all 3500 material on June 21, 1976, before the jury was selected. See transcript of proceedings of June 21, 1976, page 10, transmitted as item 34 with Supplemental Index to Record on Appeal.

CONCLUSION

For the foregoing reasons, the judgments of conviction should in all respects be affirmed.

Dated: Brooklyn, New York
January 5, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
JONATHAN M. MARKS,
Assistant United States Attorneys,
(Of Counsel).

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 10th day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Thomas J. O'Brien, Esq.
Two Pennsylvania Plaza
New York, N.Y. 10001

Paul E. Warburgh, Jr., Esq.
324 Park Avenue
Huntington, N.Y. 11743

Evelyn Valenti

Sworn to before me this
10th day of Jan. 1977

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qual. in Kings County
Commission Expires March 30, 1977